Council on Worker's Compensation
Meeting Minutes
Madison, Wisconsin
April 22, 2003

Members present: Mr. Bagin, Mr. Beiriger, Mr. Gordon, Ms. Huntley-Cooper, Mr. Kent, Mr. Newby, Mr. Olson, Ms. Vetter, Mr. Welnak

Staff present: Mr. Conway, Mr. O'Malley, Ms. Knutson, Mr. Krueger, Mr. Shorey, and Mr. Mitchell

1. Call to Order. Ms. Huntley-Cooper convened the meeting in accordance with Wisconsin's open meetings law. Mr. Bagin indicated that Mr. Gleichert was no longer interested in serving on the Council. Mr. Newby announced that Governor Doyle appointed Mr. Glaser to the Labor and Industry Review Commission (LIRC). Therefore, Mr. Glaser would not be participating in the meeting. Ms. Huntley-Cooper indicated that future meetings were scheduled for May 13, 2003 and June 9, 2003. The Council agreed to change the June meeting to Monday, June 16, 2003. The Department Secretary confirms all appointments to the Council. If the existing members whose appointments are expiring on June 30, 2003 desire to continue on the Council, they should send a letter to the Department. The Secretary will issue a letter re-appointing Council members.

Mr. Glaser later appeared briefly and indicated that he would be submitting his resignation. His appointment to the Labor and Industry Review Commission commences on May 12, 2003. Therefore he felt that it was not appropriate to continue on the Council considering negotiations may not be complete by the time his appointment was effective. Mr. Glaser expressed his appreciation to the Council members, and especially to Mr. Bagin. He worked with Mr. Bagin during his entire tenure on the Council. Mr. Glaser indicated that the advisory council process in Wisconsin works well. We are envied by other states. All of the Council members consider the welfare of injured workers. The Department is excellently staffed. The Council members congratulated Mr. Glaser and expressed their appreciation for his years of dedicated service on the Advisory Council.

2. Minutes. Mr. Welnak moved adoption of the minutes of the March 25, 2003 meeting; Mr. Bagin seconded the motion. The motion was unanimously approved.

3. Questions, Comments on Submitted Proposals. Mr. Bagin moved that the Council review the Department's proposals for approval and that the Management and Labor proposals be held until the next meeting. The Council unanimously agreed.

4. <u>Discussion and Debate of Department Proposals.</u> Mr. O'Malley explained the Department proposals. (The numbering below reflects the proposal number.) Numbers 10 through 15 involve changes to the Administrative Code.

1 & 2. Amendment to §102.16(2)(a) & (2m)(a) to require a minimum of $25 in a single or combination of charges before a dispute could be filed by a provider. The real focus is on reasonableness of fee disputes. So far in 2003, 12.9% of disputes are for amounts under $25. For 2002, 10.5% of disputes are for amounts under $25. The data for 2001 is not complete. These percentages do not include default orders issued by the Division. At the last meeting, Mr. Glaser expressed concern regarding the possibility of carriers reducing all bills by an amount under $25. The Division did not consider this when drafting this proposal. Once the provider accumulates $25 in disputed charges with the same employee for the same date of injury, a dispute could be filed. Ms. Knutson indicated that perhaps language could be included to allow the dispute to be filed regardless of the amount if the treatment had ended. The Division will develop language for final review by the Council. Mr. Gordon requested information concerning the statute of limitations for these disputes. Mr. O'Malley indicated that the general statute of limitations principle would apply and that the date of injury controls the applicable statute of limitations.

3 & 4. Amendment to §§102.16(2)(f) and 102.16(2m)(e). There are occasionally errors in Department orders and they are not brought to the Department's attention until the Department no longer has jurisdiction over the matter. The Department is requesting additional time to correct orders in necessity of treatment and reasonableness of fee disputes on grounds of mistake. The Department would have 90 days total under this proposal to issue a corrected order. Sometimes the wrong parties are listed on the dispute order. Mr. Newby expressed concern that the processes not take too long, and that 60 days would be reasonable. The Council agreed that the proposal would be approved, but allowing only for 60 days additional time.

5. This amendment to §102.18(1)(e) would correct an error in drafting language from the last agreed-upon bill. The proposed language changes "a" party to "the" party. Some insurers take the position that if some money is awarded and the employee appeals, the amount awarded by the administrative law judge does not need to be paid by the carrier because the case is on appeal. It is the Department's position that benefits not subject to the appeal should be paid by the carrier. The amendment will ensure that when a case is on appeal, to the extent that benefits are conceded, they will be paid. The Council agreed to the proposed language change.

6. This amendment to §102.31(3) provides monetary penalties for failure to answer correspondence. Currently the only available enforcement tool is through the Office of Commissioner of Insurance (OCI). Mr. Bagin indicates that there is

a problem with this proposal in that it attacks the no-fault aspect of worker's compensation. OCI promulgates insurance rules and regulations for claim handling. Mr. Bagin would rather see the Department punish repeat offenders and not penalize a first offense. Repeat offenses should be reported to OCI. Mr. Newby pointed out that the only language that is added with this amendment concerns the penalty. Mr. Shorey explained under the current system there is no penalty (forfeiture) for delays in responding to correspondence, only for failure to submit required reports. The Division's only recourse is to refer these cases to OCI. The Division does not approach OCI until the third or fourth request fails to elicit a response. The proposed amendment would extend the forfeiture authority for failure to answer correspondence and avoid the requirement that the Division refer these cases to OCI. Current practice is to send an OCI referral letter if there is no reply to the second request for information. In the last six weeks, the Division issued 225 letters. Fifty different carriers were involved, small and large carriers. Mr. Shorey has met with OCI and carriers in the past on specific situations. Mr. Bagin questioned how the monetary penalties would be collected. Mr. Shorey explained that the Division has a 98% rate of forfeiture collections. The insurer does not pay immediately and can request a rescission. Accumulated forfeitures are invoiced on monthly statements. The Department will file a complaint if necessary to receive payment on an invoice. The rate of on-time submission of medical reports has increased from 10% to 55% and is currently 65% for supplemental reports. Prior to 2003, the Division did not apply forfeitures to final supplemental report filings. Mr. Bagin commented that it is difficult to get medical records with the enactment of the Health Insurance Portability and Accountability Act (HIPAA). The carrier should not be penalized if they try and are unable to get the information. Mr. Shorey responded that the Division currently tracks reports from carriers who have indicated they can not obtain medical reports. Sometimes these claims are on follow-up for two to three years. Mr. Bagin expressed concern that the perceived effect of the privacy rules required by HIPAA will cause difficulty for insurers. Mr. Conway indicated that OCI and Eric England of the Wisconsin Insurance Alliance reviewed the proposal and are willing to send in a letter to the Council regarding their position on this proposal. Mr. Bagin indicated that he would like to review those letters. Penalties should not be passed on to employers through the insurance premium. Mr. Conway indicated that the Division's role was to get assurance that the injured employee's claim is handled appropriately and properly. The Division is seeking to improve responsiveness through education and enforcement. Mr. Bagin is still concerned that any forfeiture will be passed on through the premium process.

7. This amendment corrects a drafting error in §102.32(6) in the last agreed-upon bill. Attorney Phil Lehner and Attorney David Weir have both looked at the language. Mr. Bagin will provide Attorney Lehner's proposed language to the Department. In principle, the Council was in agreement to correct the drafting error.

8. This amendment to §102.32(6m) clarifies that advance payments of unaccrued compensation can only be considered on permanent disability or death benefits. Mr. Bagin indicated that management agrees to this proposal. Mr. Newby indicated that the interest rate should be adjusted. Mr. Bagin indicated that this was more of a labor-management issue and that perhaps the rate could be adjusted with the prime rate. It may not be in the best interest of the employee to receive payment in a lump sum. There is merit to the Department maintaining the role of "watch dog" in regard to this issue. This also came up in response to the issue of approval of compromises. Mr. Newby indicated that he had no problem with the Department's proposed language change. Mr. O'Malley indicated that the language reflects the Department's policy for a number of years.

9. This amendment increases the penalties set forth in §102.35(1). Mr. Bagin indicated that the same issues in #6 apply to this amendment. There should be a graduated penalty. Mr. Bagin did not have any concerns regarding adding §102.35(1)(b). With regard to the proposed changes to §102.35(1)(a), Mr. Bagin suggested that the Department look at some language for graduation of the penalty. Mr. Shorey indicated that for administrative purposes, it may be easier to require the Department to publish some schedule rather than delineate it in the statute. The schedule may be subject to change over time. Mr. Bagin indicated that the statute must put some limits on the penalty. The penalty should not be passed along to the employer. With the range of $100 to $500, the Division should not automatically impose $500 forfeitures. Mr. Newby indicated there was a range given by the Department and it was within the Department's discretion to impose a forfeiture within that range. There was no issue raised when the range was $10 to $100. Mr. Bagin responded that the Department has been automatically imposing the maximum amount. Mr. O'Malley pointed out that the statute first became effective in 1931. Mr. Welnak suggested that perhaps the penalty should be adjusted for inflation. Mr. Bagin indicated that he would like to see OCI's response and a graduated penalty system. Mr. O'Malley questioned whether the Council would like the graduated penalty system set forth in an administrative rule or the statute. Mr. Bagin indicated whether it was contained in a rule or a statute, it needs to contain terms like "repeated offense" and should be upgraded based on the number of offenses. Mr. Shorey stated that out of 20,000 forfeitures issued, 7,000 were sustained, and there was one appeal but it was resolved before hearing. Mr. O'Malley indicated that the Department would draft some language for review by the Council.

10. Amendment to Wis. Admin. Code § DWD 80.02(2)(b). A WKC-13 would be required if a WKC-12 was filed by the carrier or self-insured employer whether or not the injury was required to be reported under the rule. The carrier/self-insured employer must follow up on claims once they are reported for claims monitoring purposes. Mr. Bagin questioned whether this amendment required wage

information on the WKC13A. Mr. O'Malley indicated that it did not and the purpose of the proposal was to assist in closing claims. The Council agreed there was no objection to this proposal.

11. Amendment to Wis. Admin. Code § DWD 80.02(g)2. When a claim is initially reported and paid, and then later denied, the Department would still like to have notice of the denial. There have been problems in the past where the denial is not reported to the Department. Mr. Shorey indicated that the rule change would clarify current law that once the insurer files the claim and benefits are suspended or denied, that the Department receives notice. This does not include initial denials. Mr. O'Malley explained that if later the insurer raises a defense that benefits were paid by mistake of fact, the WKC-13 has a box where the insurer can indicate the claim is denied. Again, this is for claims monitoring purposes. Most insurance companies are following this procedure at the present time. The Council indicated there was no objection to this proposal.

12. This amendment to Wis. Admin. Code § DWD 80.02(2)(h) clarifies when claims should be reported to the Department and provides a denial notice procedure to the employee. The insurer/self-insured employer needs to provide notice to the employee of the decision to deny a claim and of the employee's right to a hearing. The insurer/self-insured employer would have 45 days to investigate a claim and then must make payment or provide notice of the denial to the employee only. Mr. Shorey indicated that occasionally the Department receives inquiries where the employee reported an injury and did not hear from the carrier. Currently there is no requirement in the law that the carrier or self-insured employer must notify the employee that a claim has been denied. Mr. Bagin commented that if the provider requires a signed authorization to obtain records needed to complete an investigation, the carrier could be penalized for something beyond their control. Mr. Shorey responded there is nothing in the statute currently to penalize providers who do not cooperate. Mr. Newby expressed concern that the insurer/self insurer does not provide specific reasons for denial or delay of payment. Further, he indicated and that the 45 day provision be reduced to 30 days. In addition, the carrier must not only make the first payment but ongoing payments as well. Mr. O'Malley indicated that the Department could work on some language changes and have them available for the next meeting. Mr. Bagin indicated that the 45 day time period was acceptable if the insurer/self-insurer is able to obtain medical information. The "first payment" language is in the statute already. The Council does not want to discourage payment of benefits while the claim is still being investigated. Attorney Weir indicated that some carriers make good faith payments. They pay disability benefits for one week and then stop payment while they "investigate" the claim. The carrier should make payment continuous payments on the claim and if a defense arises during the investigation, they can stop payment. Mr. Bagin indicated that sometimes carriers can not get continued information from providers. There are bad faith penalties for carriers that are abusing the system.

The first payment only gets the carrier past the 14 day rule. They still must need a reasonable basis to deny a claim. Mr. Bagin does not want to see the Council discourage first payments. Carriers are under the impression that once the first payment is made, they have a continuing obligation to make payments. Some investigation must be allowed. Ms. Knutson indicated that perhaps language could be added that requires the insurer/self-insurer to specify the information they need to complete their investigation. The employee is then on notice and can assist in obtaining the information. Mr. Newby agreed. Mr. Gordon indicated we need to encourage prompt reporting by employers. Sometimes the claim is not reported until the 14th day. Mr. O'Malley stated that language in the rule addresses this issue. Mr. Gordon responded that the language did not address payment considerations. Labor had suggested that the time frame be lessened to 30 days. Mr. Newby clarified that it would be 30 days after the initial 14 day time period. Mr. Bagin requested that the Department present some revised language to the Council at the next meeting.

13. This amendment to Wis. Admin. Code § DWD 80.02(3m) would allow the Department to require the use of electronic reporting by insurers and self-insured employers. The Department would focus on certain situations where electronic reporting would improve compliance. Mr. Bagin indicated that he was looking for a waiver provision. There is an issue raised by insurers or self-insured employers who have computer hardware or software concerns. The language should provide that upon a reasonable showing of good cause by the insurer/self-insurer, the Department may waive the electronic reporting requirement. Mr. Newby commented that the Department did not intend to require electronic reporting across the board. Mr. Welnak commented that HIPAA requires all health and welfare claims to be filed electronically. Mr. Gordon indicated that each state requires different data elements in their reporting. Mr. Bagin commented that not all companies can provide electronically the WKC13 or 13A but they can provide the WKC12. Mr. Shorey explained that for first reports, 70% are filed electronically. The Division has internet reporting capability. It would be no problem to include a review process whereby the insurer/self-insurer could provide reasons that prevent them from reporting electronically. The Department does not anticipate requiring all insurers/self-insurers to electronically report claims, it would be performance based. Mr. Newby indicated that it would be logical to provide limits; for example, exclude insurers with 25 or fewer claims. Mr. Bagin observed that some day an electronic reporting requirement may extend to providers submitting treatment notes and bills. However, unanticipated problems can result when you are on the leading edge of technology. Mr. O'Malley indicated that the Department would draft language providing for a waiver process upon a showing of good cause.

14 & 15. These amendments to Wis. Admin. Code § DWD 80.72(3)(a) and 80.73(3)(a) require notice to the provider when liability is disputed. The number

of days listed is consistent with other statutory and rule references. Mr. Knutson clarified that the notice would be sent to the provider. The Council agreed with these proposals.

Mr. Bagin questioned whether there were any sunset provisions in current statutes. Mr. O'Malley clarified that the last agreed bill removed four sunset provisions and there were currently no sunset provisions in Chapter 102.

Mr. O'Malley indicated that the Wisconsin Rating Bureau (WRB) had a proposed change to §102.31(2) and Wis. Admin. Code § DWD 80.65, which would allow insurance carriers to send cancellation notices to WRB through electronic means including e-mail. The Division supports this proposal. The Council agreed to this proposed change.

7. Correspondence: Mr. Conway indicated that correspondence was received from the Wisconsin Nurses Association regarding a proposed statutory change. Mr. Conway will arrange for their appearance at the May 13, 2003 meeting. The Council also received correspondence from Allied Construction Employers' Association Inc. regarding the union welfare plan's right to subrogation. Mr. Bagin indicated both proposals would be subject to debate. Mr. Conway indicated that for now the Department would include these two proposals in the list of public proposals. The Council agreed that no further public proposals would be considered this year.

8. Adjournment: Discussion on all agenda items concluded and the meeting was adjourned. The next meeting date is May 13, 2003.